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NO. 90-366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DAVID T. FLAHERTY,

Petitioner,

v.

THOMAS S., by his guardian ad litem, JOYCE BROOKS, JEANNETTE H., TODD C., PHILLIP B., and MARGARET R., by her guardian ad litem, CORNELIUS MANLY on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. IS THE REMEDIAL TREATMENT ORDERED FOR CLASS MEMBERS WHO CAN DEMONSTRATE CONTINUING HARM PROSPECTIVE RELIEF ALLOWED BY THE ELEVENTH AMENDMENT?

II. DID THE COURT EXCEED ITS EQUITABLE POWERS IN ORDERING REMEDIAL TREATMENT FOR THOSE WHO CAN DEMONSTRATE CONTINUING HARM RESULTING FROM UNCONSTITUTIONAL TREATMENT BY PETITIONER?

III. GIVEN THE FACTS OF THIS CASE, IS THE REMEDIAL MECHANISM PROPER?

A. Having Found That Professional Judgment Was Not Being Exercised, Was It Proper For The District Court To Order A Remedy Which Includes Independent Evaluations?

B. Did The Court Create A General Substantive Right And A Conflict Among The Circuits Merely Because The Remedial Mechanism May Result in Community Placement For Some Respondent Class Members?

IV. DID THE COURT RELY UNDULY ON THE OPINIONS OF RESPONDENTS' EXPERTS AND INCORRECTLY APPLY THE PROFESSIONAL JUDGMENT STANDARD ADOPTED IN YOUNGBERG V. ROMEO?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, members of the Thomas S. class, respectfully request this Court to deny the petition for writ of certiorari seeking review of the Judgment of the Fourth Circuit Court of Appeals in this case, as reported at 902 F.2d 250.

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case insofar as it describes the procedural history except to add that this Court has already denied Petitioner's earlier petition for a writ of certiorari in the initial phase of the case. Thomas S. v. Morrow, 781 F.2d 367 (4th Cir. 1986) cert. denied, 476 U.S. 1124 (1986) (Thomas S. I). That petition raised issues similar to those raised here.

Petitioner failed to mention any of the substantive facts of this case. In the leading mental institution conditions case, this Court cautioned, "Because the facts of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before a court." Youngberg v. Romeo, 457 U.S.307, 319, n.25 (1982). Because the case at bar is so fact specific, Respondents are obliged to provide the following summary of material facts.

The class consists of over 400 mentally retarded persons in the State's four regional psychiatric hospitals: Broughton, Cherry, Dorothea Dix, and John Umstead. Half or more of the confined Respondents have never been diagnosed as mentally ill. (Appendix to the Petition, p.28, hereinafter denoted by a page number followed by "A"). Nevertheless, they are confined in psychiatric hospitals designed to treat the mentally ill, the vast majority in general psychiatric wards. (29A). Only one of the hospitals, Broughton, has a unit designated for mentally retarded people. That unit houses only a small fraction of the class members. (29A).

The harm suffered by class members is described in detail in the trial court's decision, Thomas S. v. Flaherty, 699 F.Supp. 1178 (W.D.N.C. 1988), and is summarized below.

Class members have been physically injured as a result of the conditions at the four State psychiatric hospitals. For example, Danny W. is blind, mentally retarded, and confined to a ward at Broughton Hospital. He engages in self-abusive behavior: biting his hand and eating feces. He sits in a wheelchair on a ward with very little to do. He has not been given any sort of training. Professionals consider self-abusive behavior such as he exhibits to be directly related to his current deprived environment. Minimally adequate services would significantly reduce or extinguish the aggressive or self-injurious behavior that has injured class members like Danny W. Yet, Petitioner offers few, if any, appropriate programs for mentally retarded adults confined in the State psychiatric hospitals. (31A-33A).

Some class members have been seriously endangered and injured by the inappropriate use of antipsychotic drugs (also known as neuroleptics and psychotropics). These drugs belong to a class of medications used to treat certain psychiatric disorders, not mental retardation. Of institutionalized class members studied at three of the four psychiatric hospitals, 73 percent were being given antipsychotic drugs, yet 43 percent of that group have no diagnosis of mental illness. These drugs are dangerous and can cause severe adverse effects, including tardive dyskinesia, an irreversible neurological disease which causes a person to suffer involuntary movements of the face, arms, and

legs. About 30 percent of people who receive prolonged antipsychotic drugs develop tardive dyskinesia. (34A).

Based on the personal examination of a sample of class members, Respondents' pharmacological expert, Dr. Henry Crabbe, found that 88 percent of those examined at Cherry Hospital, 40 percent at Broughton Hospital, and 33 percent at Dix manifested obvious adverse drug effects. (34A-35A). This incidence of adverse effects at the four hospitals is in proportion to the average dosage of psychotropic drugs administered, which varied proportionately among the four hospitals. (38A).

Although professional standards and Petitioner's policies require periodic monitoring of adverse effects of the drugs, this has not been done for most class members. (34A). Nor has Petitioner adequately reviewed the antipsychotic drug prescriptions to see if they are needed, as required by professional standards. Moreover, medical recordkeeping is substandard and dangerously inadequate. All parties agree that the use of drugs to the exclusion of other methods to treat people with behavior disorders is unacceptable. Yet class members were sedated by the long-term use of antipsychotic drugs in lieu of behavioral programs, and without any regard to the safety or usefulness of the drugs for them. These dangerous shortcomings by the Petitioner have harmed class members. (35A-36A).

For example, Respondent Jeanette H. for many years suffered excessive dosages and multiple drugs until she went into a coma and was transferred to the critical care unit for drug toxicity. She nearly died. (38A-39A). Class members at the four hospitals

received long-term medication dosages two to four times higher than professional norms. Petitioner made no effort to explain these dangerously excessive dosages. (38A). There are instances where class members are sometimes given dosages which exceed even the institution's own guidelines, with no justification given. To exceed established drug dosage limits without showing a justification is a substantial departure from professional standards. (39A). In these and other ways, the manner in which Petitioner has administered drugs to class members in violation of established standards is a substantial departure from professional standards. (39A).

Petitioner's practice of tying or strapping a class member to a bed or a chair is called "mechanical restraint". "Seclusion" is his practice of confining a patient alone in a bare room. (39A). The trial court found that seclusion and restraint are commonly used on Respondents instead of systematic training to control aggressive behavior. Petitioner's seclusion and mechanical restraint practices reflect a substantial departure from the exercise of professional judgment. (39A).

For example, Mary W. engaged in self-injurious behavior, hitting herself in the head. Self-injurious behavior is often a response to stress among mentally retarded people who are bored or who have not been taught to cope. For decades, Mary W. has been strapped down all of her waking hours to prevent self-injury. She is now drawn into a fetal position, unable to turn over, reach out, or scratch an itch. Because she has been tied down for decades, her legs have atrophied so that she can no

longer walk. There is no evidence that minimally adequate training was ever provided or even considered to help Mary W. stop hitting herself. The use of restraints on Mary W. in this manner is a substantial departure from professional judgment. The Petitioner has failed to explain this excessive use of seclusion and mechanical restraint and has failed to provide class members with adequate training to overcome the behavior problems that trigger it. (32A, 40A, and 41A).

All parties agree that mentally retarded people who are continuously exposed to mentally ill patients begin to "model" the dysfunctional behaviors of the mentally ill patients with whom they are confined, because they lack the insight to distinguish between appropriate and inappropriate behavior. Thus, when mentally retarded adults are mixed with psychiatric patients, they begin behaving as though they were mentally ill. (29A and 47A). Petitioner's own experts concur with those of Respondents that minimum professional standards require developmentally oriented "habilitation" for persons with mental retardation. (45A). "Habilitation" is the process of helping a person acquire or maintain needed self-care skills. The term refers specifically to the needs of mentally retarded individuals. (28A-29A). Youngberg, 457 U.S. at 333, n.1. This habilitation is not generally provided to class members in the State's psychiatric hospitals. (45A-50A).

As was true for Thomas S. himself, many class members have behavioral problems which make them difficult to treat. Some of these problems are caused by the barren environment found in

Petitioner's psychiatric institutions. Some are caused by overcrowding. Petitioner's professionals admit that if a class member has a behavior problem, a specific plan should be developed and implemented to reduce the inappropriate behavior by teaching him appropriate social behaviors to substitute. For the vast majority of class members, however, this has not been done. (49A).

Minimal standards require properly trained staff to provide developmental habilitation to persons with mental retardation. In the psychiatric hospitals, properly trained staff are not available for class members, particularly on general psychiatric units, where the vast majority of class members reside. In the words of one of Petitioner's chief psychiatrists, "We are not in the business of treating with the adult developmental [habilitation] model." (46A).

People with mental retardation have difficulty maintaining the skills that they have. Respondents need treatment designed to accommodate their lower intelligence and related difficulties. There is a risk that unless attention is paid to class members' developmental habilitation needs, their skills will atrophy and they will regress. Within Petitioner's psychiatric hospitals, there are not enough structured activities to keep class members from developing inappropriate behaviors or losing independent living skills. As a result, many class members have lost self-care skills they possessed when they were first admitted to the State's care. Many class members have been denied appropriate habilitation for so long that Petitioner has labeled them

"institutionalized" and has given up hope for them. For example, class member William D. was admitted to Broughton Hospital in 1958. He was able to speak and make statements to the hospital interviewer when he was admitted. By 1985, however, Mr. D. had regressed to the point that he was considered to be nonverbal, and efforts to find a community placement for him were terminated. Professionals trace this deterioration to his current deprived environment. Because of the conditions at Broughton Hospital, Mary W. lost the ability to feed herself, walk, and communicate. She has contracted tuberculosis. (49A, 50A).

Class members are also unnecessarily confined to the grounds of the hospital. Stabilization of psychiatric symptoms normally takes 21 days, and behavior disorder stabilization normally takes 30-120 days. (41A). Class members who are currently confined, however, stay an average of ten years in the State psychiatric institutions. (41A). No attempt was made by Petitioner to justify such lengthy hospitalizations or to explain regional differences in length of confinement among the four hospitals.

The trial court found that the professional judgment of human service professionals in the State psychiatric institutions was severely compromised by the constraints imposed by Petitioner's inadequate service delivery system. At least one professional was threatened that his career would be jeopardized because of his unwillingness to modify his professional judgment to conform to what was available in Petitioner's institutions. He was also given false information about the time of a commitment hearing to deter him from appearing when he attempted

to make a recommendation that was dictated by his professional opinion, but was not available. (53A-54A).

These are among the numerous findings of the trial court which led it to conclude that the right to safety, freedom from restraint, and minimally adequate habilitation to maintain safety and freedom from restraint guaranteed in Youngberg was denied class members in this case. These findings were upheld by the Fourth Circuit as supported by the evidence and not clearly erroneous. Thomas S. v. Flaherty, 902 F.2d 250, 256 (4th Cir. 1990). (12A).

REASONS FOR DENYING THE WRIT

This case represents a faithful application of this Court's standard to a set of unusual facts. The Petitioner has confined several hundred adults with mental retardation in State psychiatric facilities for long periods of time, despite the fact that many of them do not have mental illness. There they are physically injured, dangerously drugged in an unregulated manner, tied down and secluded in bare rooms, unnecessarily confined to the institutions or to their locked wards, and kept in inhumane living conditions where they are guarded by untrained staff who do not evaluate them and have few appropriate services to offer. The district court, relying primarily on evidence originating with Petitioner, made detailed findings of fact and concluded that Petitioner was violating the class members' substantive due process rights enunciated in Youngberg v. Romeo, 457 U.S.307 (1982). That decision requires reasonable respect for the rights

of confined mentally retarded persons to safety, freedom from undue restraint, and minimally adequate habilitation necessary to safeguard safety and freedom. Reasonableness is measured by whether or not qualified professionals exercised their professional judgment in making treatment decisions. The trial court found that many of the professionals in the psychiatric institutions were not qualified to make decisions relating to mental retardation, that the recommendations of treating professionals were based on factors extraneous to habilitation considerations or were not followed anyway, and that the wholesale violation of treatment standards confirmed that qualified professionals were not exercising independent professional judgment.

The district court granted injunctive relief tailored to remedy the harm suffered by individual class members. The relief includes evaluations of individual needs which are to be conducted by independent professionals. These initial evaluations will be used to determine the extent of Petitioner's treatment obligation to each class member. While this individualized approach to remedying harm may result in community placement for some class members, the courts below did not create a general substantive due process right to community placement.

While the relief focuses on those currently confined, it also relieves those individuals who can show that they continue to suffer harm due to Petitioner's constitutional violations, even though the class member may no longer be in his custody.

This is a tailored remedy rather than an expansion of substantive due process rights.

This ensures future compliance with the law and dissipates the continuing effects of past misconduct. Thus, it is prospective relief which is not barred by the Eleventh Amendment.

The lower courts' approach to ascertaining liability and fashioning relief is consistent with the decisions of this Court and the courts of the other circuits. Only the facts are different, and significantly so.

I. THE REMEDIAL TREATMENT ORDERED FOR CLASS MEMBERS WHO CAN DEMONSTRATE CONTINUING HARM IS PROSPECTIVE RELIEF ALLOWED BY THE ELEVENTH AMENDMENT.

Besides ordering Petitioner to accord Respondents reasonable safety, freedom from undue restraint, and treatment to ensure such reasonable safety and freedom, the trial court ordered relief to remedy continuing "injury from unconstitutional conditions of confinement under the Secretary's care and control." (72A). Petitioner's Eleventh Amendment argument centers upon this remedial relief, particularly as it protects those who are no longer in state custody, having been discharged from the State hospitals since March 22, 1984.[1]

The lower courts in this case have scrupulously adhered to this Court's Eleventh Amendment doctrine and have ordered only

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1. Respondents' motion for class certification was filed on March 22, 1984. The definition of the class therefore includes mentally retarded adults who were confined in Petitioner's psychiatric institutions at that time or who have been so confined since then. Thus, it also may include some who have been released during the pendency of the litigation.

prospective relief. To assure the vindication of federal rights in accordance with the supremacy clause, Ex parte Young, 209 U.S. 123 (1908), states an exception to the Eleventh Amendment by allowing prospective injunctive relief in federal suits against State officials. While the distinction between prospective and retrospective relief "will not in many instances be that between night and day," Edelman v. Jordan, 415 U.S.651, 667-68 (1974), relief is considered prospective when it is less like an award of damages and is more designed to ensure future compliance with the law, Id., or to dissipate the continuing effects of past misconduct. Milliken v. Bradley, 433 U.S.267, 290 (1977) (Milliken II). The relief ordered in this case fully meets that test.

One type of continuing harm suffered by those who have been released results from Petitioner's practice of transferring many class members to substandard private board and care facilities contrary to professional judgment. (51A). This dumping practice makes them likely candidates for return to Petitioner's custody in a continuing cycle of harm. (51A). A meaningful prospective remedy designed to ensure future compliance must interrupt this cycle by addressing the continuing injury now, without waiting for class members to be returned to Petitioner's custody.

Another example of continuing harm results from inadequate individual evaluations. (45A). Such evaluations are an essential prerequisite of minimally adequate habilitation. (45A). When Petitioner prepares a faulty evaluation and then sends a class member elsewhere to receive services based on that evaluation, the harm would continue for some time. Requiring the

Petitioner to rectify this mistake and minimize the harm to such a person is prospective relief.

As a final example of continuing harm, many persons with mental retardation who are confined for a lengthy period with psychiatric patients begin to imitate the inappropriate behavior they see around them. (47A-48A). When such a person is finally transferred out of Petitioner's psychiatric hospitals, he takes these learned behaviors with him, causing the new placement to fail and the person to be returned so that the cycle continues. (47A). A meaningful remedy must stop the cycle by providing special services so that the person can unlearn the inappropriate behavior, thereby safeguarding his safety and freedom. This is prospective relief.

Petitioner in this case continues to violate the Constitution by admitting mentally retarded people into his psychiatric institutions where they are mistreated, initiating a chain of suffering. To ensure that he complies with the law and corrects his practices, the order does not permit Petitioner to escape responsibility by ultimately discharging Respondents in a manner which itself violates professional standards. He must remedy the continuing harm he causes. The trial court correctly ordered him to do so. This too is prospective relief.

Petitioner appears to argue that even the evaluations of individuals ordered by the district court are a type of retroactive relief. (Pet.9). Instead, the evaluations serve two other purposes: (1) they are necessary to determine the liability of Petitioner for individual class members and (2) they

are part of the prospective relief, or at least "ancillary to prospective relief," under Quern v. Jordan, 440 U.S.332, 349 (1979).

The remedial services and evaluations meet the Court's indicia for prospective relief. They dissipate the continuing past misconduct and also ensure future compliance with the law. The services are not at all like damages--they are not "intended to wipe the slate clean by one bold stroke." Milliken II, 433 U.S. at 290.

The decisions in this case do not conflict with the Supreme Court and circuit court decisions cited by Petitioner. Each is distinguishable. In Green v. Mansour, 474 U.S.64 (1985), the Court held that claims for prospective relief were rendered moot by changes in federal law. Id. at 67. Yet the Court noted the general rule: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." (Citations omitted). Id. at 68.

Pennhurst State School & Hosp. v. Halderman, 465 U.S.89 (1984), sheds no additional light on the meaning of prospective relief against a state liable under federal law. The Pennhurst decision involved patients' rights under state law, a fact which the Court held to be decisively distinguishable for Eleventh Amendment purposes. Id. at 106. The Court reiterated the distinction between "an injunction that governs the official's future conduct . . . [and] one that awards retroactive monetary relief." Pennhurst, 465 U.S. at 103.

In Quern v. Jordan, 440 U.S.332 (1979), this Court held that a federal court-ordered notice from the State concerning back benefits was ancillary to prospective relief and thus not contrary to the Eleventh Amendment. Quern, 440 U.S. at 349. The Court reiterated the Eleventh Amendment bar to a federal court's order of payments from the State to an individual, Id. at 337, but did not address the meaning of the prospective/ retroactive distinction as applied to services. In allowing the notice, the Court found it decisive that "the notice relief does not constitute a money judgment . . . ." Id. at 348, n.20.

The Eleventh Amendment did not apply in Will v. Michigan Dept. of State Police, 491 U.S. ___, 109 S.Ct 2304, 105 L.Ed 2d 45 (1989), because the suit was filed in state forums. Will, 105 L.Ed 2d at 53.

Nor does the decision in Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), conflict with the decisions in this case. The case is distinguishable on two grounds. There, the plaintiff requested services measured by "the cost of an educational program. . ." Miener v. State of Mo., 498 F.Supp. 949, 950 (E.D. Mo. 1980). The Circuit Court characterized this request as practically indistinguishable from a request for tuition reimbursement barred by the Eleventh Amendment. 673 F.2d at 982. Measuring relief by cost is what makes relief like a money judgment or damages, and thus a retroactive remedy barred by the Eleventh Amendment. Edelman, 415 U.S. at 668. In contrast, the order in Thomas S. measures the necessary relief not by cost, but by professional judgment about relieving continuing harm.

(77A, 79A). Petitioner retains latitude in developing the remedial treatment and in using his resources in any manner consistent with the terms of the order and the individual's treatment needs.

The decision in Miener turned also on the finding that the expenditure of state moneys would not "ensure 'compliance in the future with a substantive federal question determination.'" Miener, 673 F.2d at 982, quoting and citing Edelman, 415 U.S. at 668. The differing facts of Thomas S. make the remedy ordered here properly designed to ensure future compliance with federal law.

Nor does the decision in Thomas S. conflict with the law in the Ninth Circuit. Petitioner cites Alexopulos v. Riles, 784 F.2d 1408 (9th Cir. 1986). Like Miener, Alexopulos is distinguishable from Thomas S. because the court there found that the relief in question would not ensure compliance with federal law. Alexopulos, 784 F.2d at 1412. Alexopulos is distinguishable also because the court there concluded that the entitlement statutes did not apply to plaintiff at the time in question, and the suit was time-barred. 784 F.2d at 1411, 1412. These cases cited by Petitioner are thus inapposite.

In the only other circuit court decision which addressed the Eleventh Amendment in a mental institution conditions case, the Third Circuit approved an order that State officials fund a remedy "to undo the harmful effects of past constitutional violations." Clark v. Cohen, 794 F.2d 79, 84 (3rd Cir. 1986), cert. denied, 479 U.S.962 (1986) (citing Milliken II).

Petitioner tries to distinguish Milliken II, but that case shows clearly why this case, as distinguished from those cited by Petitioner, involves prospective relief. In Milliken II, this Court unanimously approved an order requiring the State to pay the future costs of remedial educational programs ordered to correct harm caused by past constitutional violations addressed in a school desegregation order, "notwithstanding [its] direct and substantial impact on the state treasury." Milliken II, 433 U.S. at 289. The remedy included services for some students who had left the system after the lawsuit was filed, Bradley v. Milliken, 402 F.Supp. 1096, 1140 (E.D. Mich. 1975), just as in the present case. Likewise, that case did not involve

> a raid on the state treasury for an accrued monetary liability. . . the victims [of the school system's violations would] continue to experience the effects . . . until . . . the remedial programs can help dissipate the continuing effects of past misconduct. [The elimination of] reading and speech deficiencies will require time, patience and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a [different] system. . . [This] is not barred by the Eleventh Amendment.

Milliken II, 433 U.S. at 290, n.22. In every respect, these statements apply to the instant case.

II. RESPONDENTS' SUBSTANTIVE DUE PROCESS RIGHTS HAVE NOT BEEN EXPANDED BY THE EQUITABLE REMEDIAL TREATMENT ORDERED FOR THOSE WHO CAN DEMONSTRATE CONTINUING HARM RESULTING FROM UNCONSTITUTIONAL TREATMENT BY PETITIONER.

Petitioner argues that the order requiring remedial treatment for some Respondents who have been discharged from the State hospital represents "an unwarranted expansion of substantive due process rights." (Pet. 11). In pressing this argument, Petitioner fails to grasp the distinction between a Constitutional right and an equitable remedy designed to correct harm caused by violation of the right. Even where there is no constitutional right to something per se (e.g., busing), a remedy which includes or results in such a measure can be ordered to correct a constitutional violation under the circumstances of a particular case. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15-17, 28 (1971). ". . . [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies. . . ." Id. at 15-16.

Contrary to Petitioner's suggestion, the lower courts did not find that ex-patients living in the community free of State control have a generalized right to treatment. Rather, the court found that some class members' right to minimally adequate treatment prescribed by Youngberg had been so seriously violated by Petitioner that they continued to suffer harm following their discharge from the hospital. As to those individuals, the court found the Petitioner responsible for furnishing remedial treatment to correct the continuing harm caused by his violation of their constitutional rights. (9A, 72A, 73A). The remedy ordered by the trial court and affirmed by the Fourth Circuit is

entirely consistent with this Court's rulings and other circuits' decisions. Once a constitutional violation is found, a court has a duty to use all reasonable methods to achieve the greatest possible relief. Hills v. Gautreaux, 425 U.S. 284, 297 (1976). "[R]emedial programs may, in the exercise of equitable discretion, be appropriate remedies. . .". Milliken II, 433 U.S. at 286, n.17.

An equitable remedy must be designed to restore victims of unconstitutional conduct to the position they would have occupied in the absence of such conduct. Swann, 402 U.S. 1, (1971); Milliken v. Bradley, 418 U.S. 717, 746, (1974) (Milliken I). In Bazemore v. Friday, 478 U.S. 385, 386-87 (1986), the Supreme Court held the State of North Carolina responsible for curing the effects of pay discrimination that continued after the 1965 desegregation of the State agriculture extension service. Had the trial court in Thomas S. not ordered remedial treatment, then the minimally adequate treatment envisioned by Youngberg would be of little benefit for class members who have been so seriously harmed that they now need corrective treatment.

Petitioner's reliance on DeShaney v. Winnebago County, 489 U.S. ___, 103 L.Ed.2d 249 (1989), for his contention that he has no obligation to treat any of the Respondents who have been released, is misplaced. There, the Court held that the State has no affirmative duty to protect the life, liberty, and property of citizens not in its custody against invasion by a private actor. 489 U.S. at ___, 103 L.Ed.2d at 258-59. However, once a state assumes responsibility for treatment of a mentally retarded adult

confined to its hospitals, certain minimum constitutional standards attach. Youngberg, 457 U.S. 307. This Court has already recognized the distinction. After discussing Youngberg with approval, the Court in DeShaney said:

> The Estelle-Youngberg analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered did not occur while he was in the state's custody, but while he was in the custody of his natural father, who was in no sense a state actor.

103 L.Ed.2d at 262 (footnote omitted).

Petitioner's reliance upon Philadelphia Police & Fire Ass'n. v. City of Philadelphia, 874 F.2d 156 (3rd Cir., 1989), is similarly misplaced. There, the court found that mentally retarded persons had no substantive due process basis for challenging cuts in services that they received while living at home. In the present case, the trial court has not found that all mentally retarded adults living in the community have a right to treatment. Rather, Petitioner was found to owe a duty to Respondents in his custody. Since he breached it, the court properly used its equitable powers to order a remedy for those suffering continuing harm from that breach, even if some have been discharged.

III. GIVEN THE FACTS OF THIS CASE, THE REMEDIAL MECHANISM IS PROPER.

Having concluded that Petitioner is violating the constitutional rights of Respondent class members generally, the district court ordered the establishment of a second stage litigation mechanism to verify the violation of constitutional rights as to each class member and to ensure a proper remedy for those with a verified violation. Its individualized nature is in keeping with the emphasis in Thomas S. I, of focusing on treatment for specific individuals. 781 F.2d at 375-76. To verify individual rights violations, the court ordered independent evaluations of individual class members' treatment needs with reference to the minimal constitutional standards found by the district court. (77A). Given the detailed findings of liability, requiring this verification process is a narrow and proper exercise of the court's power. Petitioner objects to the court-ordered evaluation because he would rather verify his own liability for particular Respondent class members himself.

A. Having Found That Professional Judgment Was Not Being Exercised, The District Court Properly Ordered A Remedy Which Includes Some Independent Professionals.

The district court, consistent with Youngberg, 457 U.S. at 321, began with the presumption that qualified professionals were exercising judgment. (26A). Respondent then overcame this presumption by showing that many of Petitioner's practices substantially departed from professional standards, that many decisions were not being made by qualified professionals (46A, 53A, 58A), that the recommendations of treating professionals were often not followed anyway (30A, 50A-51A, 53A, 57A, 58A), and

that as a result, treating professionals failed to exercise real professional judgment (50A-51A, 53A).

This established, the district court was faced with the challenge of fashioning a remedy. Because of the continuing history of obstacles to the exercise of independent judgment by qualified professionals for mentally retarded class members in Petitioner's psychiatric hospitals, the district court ordered that the initial remedy-stage evaluation of class members be conducted by qualified mental retardation professionals who are not affiliated with the parties. (77A). Petitioner's staff will then develop treatment plans based on these evaluations. The independent evaluation is only the initial evaluation. The district court ordered Petitioner himself to make periodic evaluations thereafter. (78A).

Except for cost, Petitioner does not say whether or how he would be harmed by the use of independent evaluators in the remedy. Petitioner contends that allowing the remedy to be based in part on the recommendations of independent professionals violates the holdings in Youngberg, but Youngberg did not address the issue of remedy, let alone injunctive remedy, once a violation is found.[2] Rather, the Youngberg decision prescribes the method for determining whether a constitutional violation occurred.

2. In Youngberg the constitutional violation question arose in the context of a damages action. 451 U.S. at 310.

Petitioner argues that ". . . having detected and set forth constitutional violations, the District Court should simply have ordered that unconstitutional practices be corrected--through amendment of treating professional recommendations. . . ." (Pet. p.16). Petitioner would rather not face an order with a remedial mechanism, even though the Respondent class consists of several hundred persons. Petitioner cites no authority for his approach. To the contrary, as Chief Justice Burger wrote for a unanimous Court: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann, 402 U.S. at 15. The power to mold each decree to the necessities of the particular case is the essence of equity jurisdiction. Id. Independent, individualized evaluations constitute a narrowly tailored remedy for systemic obstacles which prevent the exercise of judgment by qualified professionals in Petitioner's hospitals. They also provide relief designed to address particular violations of each class member's rights.

In essence, Petitioner is urging that he be allowed to verify his own liability with regard to individual respondents. The court put Petitioner on notice about his responsibilities and failings years ago in Thomas S. (I), 601 F.Supp. 1055 (W.D.N.C. 1984), aff'd, 781 F.2d 367 (4th Cir. 1986), cert. denied 476 U.S. 1124 (1986). Yet, Petitioner has continued to violate Respondents' constitutional rights. (30A, 61A). Upon finding these violations and concluding that Petitioner's system was

structurally flawed and failed to conform its practices to its own written policies and regulations, (34A-36A, 38A, 68-69A), the trial court ordered the initial participation of independent evaluators. Now Petitioner seeks to fashion his own remedy by arguing that the trial court should be restricted to issuing a simple order instructing him to do right. The district court's order was a properly tailored exercise of its equitable powers.

Petitioner attempts to draw a contrast between the court's approach of using independent evaluators in this case and the Fifth Circuit's opinion in Lelsz v Kavanaugh, 807 F.2d 1243 (5th Cir.); reh. denied, 815 F.2d 1034, cert. dismissed, 483 U.S. 1057 (1987). The Circuit Court in Lelsz rejected the district court's reliance on a team of experts because the team was guided by the state law's optimum standard of habilitation instead of the federal constitution's minimally adequate habilitation standard. Lelsz, 807 F.2d at 1251.[3] In contrast, the independent evaluators ordered here are confined to the law of this case which applies the Constitution's minimally adequate habilitation standard. (77A). This standard per se incorporates deference and respect for the state's interests and its qualified treating professionals. Youngberg, 457 U.S. at 321-22. Thus, whereas use of a state law optimum habilitation standard "would undermine Youngberg's emphasis on the judgment of the State's professionals," (Pet. 16), the remedial use of independent

3. The Lelsz court cited this court's holding in Pennhurst School v. Halderman, 465 U.S. 89 (1984), that, by operation of the Eleventh Amendment, a federal court cannot enforce state law against a nonconsenting state. Lelsz, 807 F.2d at 1252-53.

evaluators applying the minimally adequate habilitation standard would not.

B. The Fact That The Remedy May Result In Community Placement For Some Class Members Does Not Create A Substantive Right And Does Not Conflict With Decisions From Other Circuits.

Petitioner argues that the Fourth Circuit upheld a ruling which guarantees community placement for class members and is thus in direct conflict with other circuits which have found no substantive due process right to community placement. This is an erroneous characterization. The Fourth Circuit creates neither a general substantive right to community placement nor a right to treatment in the least restrictive setting. Rather, the Fourth Circuit upheld a remedial mechanism based on conclusions that respondents had been deprived of their due process rights to safety, freedom of bodily movement, and minimally adequate training to ensure safety and freedom from undue restraint. (7A). Hence, while the remedial mechanism established by the court might lead to community placement for some class members, this is not the same as the creation of an underlying substantive right to community placement.

The distinction was clarified by this Court in Swann, 402 U.S. 1 (1971), where the Court held that even where there is no constitutional right to something per se, a remedy which includes or results in such a measure can be ordered to correct a constitutional violation. Id. at p.28. In Youngberg, this Court said:

> A federal court must, of course, identify a constitutional predicate for imposition of any affirmative duty on a State.

> Because the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of a case before the Court.

457 U.S. at 319, n.25.

Here, the district court made numerous factual findings to support the constitutional predicate that Respondents' right to safety, freedom from restraint, and habilitation were violated. These included findings of overcrowding (46A), inadequate staff (33A), placement on psychiatric wards of people who are not mentally ill (30A), failure to provide "habilitation" (45-46A), excessive restraint(41A), excessive dosages of medication (33-35A), and other violations.

Petitioner argues that the Fourth Circuit's opinion in this case conflicts with the Fifth Circuit's opinion in Lelsz, 807 F.2d 1243. Lelsz is clearly distinguishable, however, because the Fifth Circuit was not reviewing a question of remedy. Rather, the issue was whether there was a constitutional predicate for imposition of the duty imposed. The district court in Lelsz was enforcing a consent decree entered before this Court's decision in Pennhurst State School v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed 2d 67 (1984) (Pennhurst II), which, based on state law, provided explicitly for habilitation in "the least restrictive alternative living conditions possible. . . ." 807 at 1247. In declining to enforce the consent decree, the Fifth Circuit held that there is no federal substantive due process right to habilitation in the least restrictive environment. Id. at 1251. Thus, the Fifth Circuit held, there was no federal constitutional violation on which a

remedy could be based. Id. In a post-Lelsz decision for an individual member of the Lelsz class, the Fifth Circuit cited Thomas S. I, with approval where the facts showed that a community-based home placement was the professionally recommended treatment for that individual. Savidge v. Fincannon, 836 F.2d 901, 906 (5th Cir. 1988).

Nor is there a conflict between the Fourth Circuit and the Second Circuit decision in Society for Good Will v. Cuomo, 737 F.2d 1239 (2d Cir. 1984). As in Lelsz, the Second Circuit in Good Will overturned the district court's least restrictive environment analysis which had been based on State law. Id. at 1248. Thus the lower court had not established the constitutional predicate necessary to impose a remedy. The Second Circuit noted that a specific order for the community placement of 400 people was not tailored to remedy a particular constitutional deficiency. Id. at 1251. In so ruling, however, the court cited overcrowding as an example of a deficiency that could justify an order for community placement. Most recently, in Society for Good Will III, the Second Circuit acknowledged the permissibility of community placement as a remedy in some circumstances. Society for Good Will v. Cuomo, 902 F.2d 1085, 1091 (2d Cir. 1990).

Petitioner also claims that this case is in conflict with decisions of the Eleventh Circuit, citing S.H. v. Edwards, 860 F.2d 1045 (11th Cir. 1988). Like Lelsz, that case held that there is "no substantive due process right to habilitation in a

community setting." 860 F.2d at 1051. Petitioner failed to cite the circuit decision on rehearing in that case, which cautioned:

> Nor should this ruling be interpreted as limiting in any way the relief that is available to . . . individual members of the class should they prove that habilitation in a community setting is required to comply with the law of this circuit that persons so confined be given "minimally adequate" care in accordance with professional standards. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

886 F.2d 292, 293 (11th Cir. 1989).

The remaining cases cited by Petitioner for his assertion of conflict are also distinguishable. Hanson v. Clarke Co. Iowa, 867 F.2d 1115 (8th Cir. 1989), was an action for monetary reimbursement for an out-of-state placement in a group home for sufferers of Prader-Willi Syndrome. Hanson sought a finding that the State had a constitutional duty to fund her placement in the least restrictive environment. The Eighth Circuit held that there is no substantive right to placement in the least restrictive environment. Id. at 1120. Nothing in this case is inconsistent with the findings in Thomas S. below.

In Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983), the Seventh Circuit upheld factual findings by the district court that class members were receiving constitutionally adequate vocational, educational, and self-care training that was prescribed in the exercise of professional judgment. The facts are dramatically different here.

Johnson v. Brelje, 701 F.2d 1201 (7th Cir. 1983) concerned the due process rights of criminal defendants found unfit to stand trial. Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983) addressed the issue of professional judgment under Youngberg as

applied to the right of mental patients to refuse medication. Neither case concerned community placement as either a substantive right or as a possible remedy once a substantive right to minimally adequate safety, liberty, or training to preserve safety and liberty has been violated.

This Court articulated a clear standard in Youngberg for use by lower courts in reviewing the conditions of confinement and treatment of individuals with mental retardation. Cases differing on their individual facts and presenting legal issues particular to those facts have resulted in different but consistent decisions. This is natural and expected. It simply illustrates individual applications of Youngberg as foreseen by this Court in that decision.

IV. RELYING HEAVILY ON EVIDENCE FROM PETITIONER, THE DISTRICT COURT CORRECTLY APPLIED THE PROFESSIONAL JUDGMENT STANDARD ADOPTED IN YOUNGBERG V. ROMEO.

Petitioner contends that the lower courts in this case, by relying primarily on Respondents' experts, effectively abandoned the Youngberg presumption that professional judgment was exercised. (Pet. 18). This contention is false and ignores the trial court's citations to the record and findings of fact.

Youngberg established that confined mentally retarded persons have liberty interests in reasonable safety and freedom from bodily restraint. 457 U.S. at 315-16. These liberty interests "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." 457 U.S. at 319. In determining what is

"reasonable," the Court in Youngberg stated that courts must show deference to the decisions of a qualified professional, unless the decision "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Id. at 322-23. Thus, the presumption of validity which is afforded by Youngberg is a rebuttable presumption which can be overcome by showing a substantial departure from accepted standards or practice.

In the present case, the court accorded such deference to Petitioner's treating professionals by applying the presumption that the decisions were valid. The court then found that Respondents had rebutted the presumption by showing: (1) many of the professionals making decisions concerning class members are not qualified, (46A, 53A)[4]; (2) the professionals' judgment is not independent, (53A); (3) the professionals' recommendations are frequently ignored anyway, (30A, 50A-51A, 53A, 57A, 58A); and (4) the practices fall substantially below minimum standards, (31A-52A). Petitioner focuses on the fourth basis of this holding. Yet any one of them would justify the court's decision.

To determine whether or not there was a substantial departure from accepted minimum standards, the trial court first

4. Contrary to Petitioner's assertion, the district court did not find that psychiatrists are unqualified to make professional judgments about mentally retarded patients. However, the court did find that medical training alone did not automatically qualify someone to work as a mental retardation professional. (46A). This finding was based on the testimony of Respondents' expert Dr. Crabbe, and corroborated by Petitioner's expert Dr. Dorfman.

ascertained the nature of the standards applicable in this particular case. In Youngberg, this Court noted that the testimony of Respondents' experts would be relevant. 457 U.S. at 323, n.31. Petitioner argues that the lower courts in this case relied too heavily on Respondents' experts. To support that argument, Petitioner contends that only six of 26 professional standards identified by the district court (29A-53A) were not defined in reliance upon Respondents' experts. (Pet. 18). This representation is false and misleading. The district court identified 25 standards. Many of these standards were not contested by Petitioner at trial. Of the 25 standards: (1) nine were defined in exclusive reliance on testimony of Petitioner's experts, agents, and/or documents; (2) 14 were defined in reliance on both Petitioner's and Respondents' experts, agents, and/or documents; and (3) only two standards were defined in exclusive reliance on Respondents' witnesses and/or documents. Thus, 23 of the 25 professional standards identified by the district court were defined in reliance, in whole or in part, upon Petitioner's experts, agents, and/or documents. The trial court acknowledged its heavy reliance on information originating with Petitioner. (26A). Much of this evidence was introduced at trial by the Respondent in the form of deposition testimony or as documents acquired during pre-trial discovery. Merely because the Respondent introduced this evidence at trial does not convert its source from the Petitioner to the Respondent.

To support his argument that the trial court must not rely on the testimony of Respondents' experts, Petitioner turns to

Good Will I, 737 F.2d 1239; Goodwill III, 902 F.2d 1085; and Lelsz, 807 F.2d 1243. These cases do not support Petitioner's argument and are otherwise distinguishable from the present case.

In Good Will III, 902 F.2d at 1089-90 (quoting Good Will I, 737 F.2d at 1248-49), the Second Circuit held that the trial court should determine whether treatment substantially met professionally accepted minimum standards and not use expert testimony to choose between the better of two professionally acceptable choices or ascertain whether the professional's judgment was "unassailable". Similarly, the court in Lelsz rejected the use of outside experts for the purpose of choosing the "optimum" treatment. 807 F.2d at 1251. The lower courts in the instant case, adhering to Youngberg, 457 U.S. at 321, took the same approach as the courts in Good Will and Lelsz. Contrary to Petitioner's unsupported assertion, (Pet. 22), the courts in this case applied a minimum standard rather than an optimal or even preferable standard. (4A and 26A). Moreover, there was no reported contention in Good Will or Lelsz that the professionals making the treatment decisions were not qualified to do so.

Petitioner contends that, but for a few isolated instances, appropriate professionals were making treatment decisions and that the Youngberg standards of safety, freedom from undue restraint, and habilitation have been met. (Pet. 21). If Petitioner is challenging the adequacy of the district court's findings, the opinion, with its 198 citations to the record, speaks loudly for itself in refutation. The findings may not be overturned on appeal unless they are clearly erroneous. Anderson

v. Bessemer City, 470 U.S. 564 (1985). If Petitioner is complaining merely that the district court did not make findings with reference to enough particular class members, he misconstrues the evidence and misconceives the nature of class litigation. The court pointed to 13 particular individuals whose rights had been violated in one or more ways by Petitioner's unqualified professionals and by inappropriate treatment decisions. These examples of constitutionally infirm treatment were included for illustrative purposes rather than to delineate the scope of class injury. For most of the 25 standards discussed earlier, the court found that "many", "most", "the vast majority", or all class members were subjected to significant departures from minimum standards. For example, the "great majority" of class members did not receive interdisciplinary assessments, universally agreed to be the first principle of appropriate habilitation. (45A). A class action is a procedural device to accomplish judicial economy and judicial efficiency. See Fed.R.Civ.P. Rule 23(a). By design, class actions do not require that violations be proven at the trial stage for every class member. In this case, it remains to be verified through the court-ordered process which, if any, particular violations were visited upon individual members of the class.

Petitioner argues erroneously that the trial court in this case departed from the Youngberg approach by finding treatment rights unrelated to the constitutional predicates of safety and freedom from undue restraint. (Pet. 20). The examples he gives, though, are misleading. For example, he mentions

educational opportunities, but the court did not. (Pet. 20). Petitioner mentions "acquisition of self-care skills." (Pet. 20). What the court in this case actually held was that Respondents have a right to "[m]inimally adequate habilitation to maintain basic self-care skills." (Emphasis added). (64A, 76A). This is the same right upheld in the decision Petitioner cites to make his point. Good Will I, 737 F.2d at 1250. See also Youngberg, 457 U.S. at 327 (concurrence by Justice Blackmun). Similarly, the court did not uphold a right to employment (Pet. 20), but ordered relief to include the availability of vocational training services (72A), because they are often "an essential service to avoid unnecessary restraint." (48A). (Pet. 20). In this case, the habilitation rights accorded Respondents are securely anchored in the record and clearly tied to the constitutional predicates of safety and reasonable freedom from undue restraint. The trial court, relying heavily on Petitioner's evidence, correctly applied the professional judgment standard.

CONCLUSION

The petition for certiorari in this case is based largely on an erroneous characterization of the opinions below and a confusion between rights and remedies. Once these are cleared up, it is obvious that the decisions below adhere to well-established principles enunciated by this Court and create no conflict among the circuits. The petition for writ of certiorari should be denied.

Respectfully submitted this 26th day of September 1990.

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Supreme Court Bar, and that on the 24th day of September 1990, I have served three copies of the RESPONSE TO PETITION FOR CERTIORARI by placing the same in the United States Mail, first class postage prepaid, addressed to the following:

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